IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 2006 Session

Penn-Star Insurance Company v. Richard A. Willis, Woody Ashley d/b/a Woody's Tree Service, and David Ashley

An Appeal from the Chancery Court for Coffee County
No. 03-296 John W. Rollins, Chancellor

No. M2005-00899-COA-R3-CV - Filed on July 28, 2006

This is a declaratory judgment action on an exclusion in an insurance policy. The plaintiff insurance company provided a commercial general liability policy to a tree trimming service, excluding coverage for events causing bodily injury arising out of the use of an automobile. An innocent bystander was injured when an employee of the tree service used his personal vehicle at a work site to remove a log lodged under a piece of equipment. The innocent bystander filed a lawsuit against the tree service alleging that the tree service was negligent in removing the log. Subsequently, the insurance company filed this declaratory judgment action seeking a declaration that the exclusion in the insurance policy applied to the innocent bystander's injuries. The trial court granted the insurance company's motion for summary judgment, finding that the policy exclusion was applicable to the innocent bystander's injuries because they arose from the use of an automobile. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and DONALD P. HARRIS, SP.J., joined.

Jeffrey D. Ridner, Tullahoma, Tennessee, for Defendant/Appellant Richard A. Willis.

Thomas J. Smith, Nashville, Tennessee, and Michael J. Vetter, Nashville, Tennessee, for Plaintiff/Appellee Penn-Star Insurance Company.

OPINION

This case involves a question of insurance coverage under a commercial general liability policy ("Policy") issued to Defendant Ellis Woody Ashley (d/b/a Woody's Tree Service) by Plaintiff/Appellee Penn-Star Insurance Company ("Penn-Star"). The incident giving rise to the dispute occurred in September 1999, when Defendant/Appellant Richard A. Willis ("Willis"), an innocent bystander, was injured at a site at which Woody's Tree Service was performing work.

For purposes of this appeal, these facts are undisputed. On September 1, 1999, employees of Woody's Tree Service were working on a tree trimming and tree removal project in Tullahoma, Tennessee. Among the workers on the project was David Ashley, who is Woody Ashley's son and was an employee of Woody's Tree Service. During the project, David Ashley noticed that a log was wedged behind the driver's side rear tire of a tree trimming truck owned by Woody's Tree Service. Apparently, David Ashley first used a company pickup truck to attempt to remove the log, tying a rope around the log and attaching the rope to the truck to try to pull out the log. After this proved unsuccessful, David Ashley used his personal vehicle to dislodge the log in the same manner. This attempt was too successful; the wedged log broke free in an uncontrolled manner, striking Willis' ankle and causing severe injuries.

As a consequence of these events, Willis filed suit against Woody Ashley (d/b/a Woody's Tree Service) and David Ashley in the Coffee County Circuit Court in May 2000, seeking damages for the injuries he sustained in the accident. Willis' suit alleged that Woody's Tree Service was liable for Willis' injuries, based on David Ashley's negligence. The complaint alleged as follows:

> The Defendants were negligent in that they:
>
> (a) Had a duty to use proper equipment to assure the safety of innocent bystanders, they breached this duty by using a log of wood to stabilize a commercial work vehicle.
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> (b) Had a duty to apply reasonable safety measures in the removal of the log of wood used to stabilize the commercial vehicle and breached this duty by removing it with another automobile without taking adequate precautions.
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> (c) Had a duty to undertake adequate measures to prohibit the log from careening toward innocent bystanders after removal and breached this duty by failing to employ adequate measures to stop the log after its removal.
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> (d) Had a duty to remove all persons, including innocent bystanders from the zone of danger while attempting to extract the log from underneath a commercial vehicle and breached this duty by failing to remove persons from the areas where the log could travel after being dislodged.
>
> (e) Had a duty to warn all persons including innocent bystanders of the danger associated with the planned maneuver, and breached this duty by failing to warn.

Based on these allegations, Willis sought a judgment in the amount of $200,000.

As a result of Willis' lawsuit, Penn-Star, the insurer for Woody's Tree Service, filed a complaint for declaratory judgment in the Coffee County Chancery Court, seeking to be relieved from any duty under the Policy to defend Woody's Tree Service in Willis' personal injury action. The complaint asserted that, based on the language in the Policy, the bodily injury suffered by Willis

in the September 1999 accident was not a covered event.[1] Penn-Star argued that one of the exclusions in the Policy applied, namely, the exclusion for bodily injury arising out of the use of an auto owned and operated by an individual insured under the policy. The complaint did not contend that the Policy excluded coverage for any acts of negligence attributable to Woody's Tree Service that did not arise out of the use of the automobile.

The Policy period began on August 10, 1999, and was set to terminate on August 10, 2000. The Policy provided coverage for all employees of Woody's Tree Service, "but only for acts within the scope of their employment . . . or while performing duties related to the conduct of [Woody's Tree Service] business." The Policy also provided that Penn-Star was obligated to defend Woody's Tree Service in lawsuits in which "the insured becomes legally obligated to pay [] damages because of 'bodily injury,'" although the Policy stated that Penn-Star did not have a duty to defend Woody's Tree Service "against any 'suit' seeking damages for 'bodily injury' . . . to which insurance does not apply." The Policy expressly excluded coverage for bodily injury or property damage arising out of the use of any automobile[2] owned or operated by any insured.

Willis filed an answer to the complaint for declaratory judgment on January 22, 2004. In the answer, Willis admitted the terms of the Policy. Willis argued, however, that the Policy's exclusion for injuries arising out of the use of automobiles was inapplicable because David Ashley's personal truck constituted "mobile equipment"[3] under the contract, and not an "automobile."

On August 13, 2004, Penn-Star filed a motion for summary judgment, arguing that David Ashley's personal pick-up truck was an "auto"and not "mobile equipment" under the contract, and that because the injury was caused by his use of the truck, the event was excluded from coverage under the Policy. In Willis' response to Penn-Star's statement of undisputed facts, Willis admitted each allegation, except to note that the original complaint contained various allegations of negligent acts by Woody's Tree Service, and to argue that genuine issues of material fact remained as to these allegations. In the memorandum of law submitted by Willis in opposition to Penn-Star's motion for summary judgment, Willis argued that the other acts of negligence attributable to Woody's Tree Service were not excluded from the commercial general liability coverage by virtue of the automobile exclusion. Willis' memorandum admitted, "If the only allegation of negligence against [Woody's Tree Service] was the operation of the automobile, [Penn-Star] would be entitled to summary judgment." Nevertheless, Willis argued, Penn-Star had a duty to defend Woody's Tree

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[1] Penn-Star's complaint, filed on July 7, 2003, noted that, until the filing of the complaint for declaratory judgment, Willis' personal injury action was defended by another insurance carrier based on an automobile liability policy held by Woody's Tree Service.

[2] The Insurance Policy defined "auto" as "a land motor vehicle . . . for travel on public roads, including any attached machinery or equipment. But, 'auto' does not include 'mobile equipment.' "

[3] Willis argued that the contract defined mobile equipment as a vehicle "designed for use principally off public roads." Willis submitted "that the vehicle in question belonging to . . . David Ashley was a four wheel drive off road vehicle meant for purposes of transporting individuals or items, either in the bed of said vehicle or behind said vehicle, on and over terrain inaccessible via the average 'auto.' " This argument has not been raised on appeal.

Service because the company's negligent acts were covered by the Policy, irregardless of the operation of the automobile exclusion clause.

After holding a hearing on the matter, on January 18, 2005, Chancellor John Rollins entered an order on Penn-Star's motion for summary judgment. The trial judge's memorandum opinion explained that he considered the exclusionary clause in the Policy to be dispositive:

> It is undisputed that the 1979 Chevrolet pickup truck was owned by defendant David Ashley, was his personal vehicle and that he drove it to and from work. It is undisputed that David Ashley is covered under the general commercial liability policy issued to Woody's Tree Service, however it is clear from the record and the clear language of the coverage, the 1979 Chevrolet pickup vehicle is excluded from the coverage under this policy.
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> The undersigned has read the case law submitted that addresses the issue of concurrent causes and is persuaded by the logic of the case cited by plaintiff: ***St. Paul Reinsurance Company v. Williams***, 2004 WL 1908808 (Tenn. Ct. App. Aug. 25, 2004). A review of the reasoning in the ***Williams*** case carefully examines the doctrine of concurrent causation and from the facts in the case before the undersigned it appears there is no concurrent causation. The purported loss resulted solely from the use of an excluded vehicle under the general commercial liability policy.

Thus, relying on caselaw on concurrent causation, the trial court granted summary judgment in favor of Penn-State. After entry of the trial court's order, Willis filed a motion to alter or amend the judgment under Rule 59.04 of the Tennessee Rules of Civil Procedure. This motion was denied on March 9, 2005.[4] On April 7, 2005, Willis filed his notice of appeal.

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[4] The same day that the trial court held a hearing on Willis' motion to alter or amend the order granting summary judgment to Penn-Star, Willis submitted a notice that, in the underlying personal injury lawsuit, he had filed a voluntary non-suit as to David Ashley and a motion to amend the complaint. The *proposed* amended complaint in the underlying lawsuit against Woody's Tree Service included two new allegations, purportedly unrelated to the operation of an automobile:

> 10. Defendant, Woody's Tree Service's employees, in attempting to free the log which they had cut during their tree trimming activities from beneath the tree trimming vehicle were engaged in an activity which could not be done safely and was always dangerous. Such activity constituted an ultra-hazardous or abnormally dangerous activity and the Defendant is strictly liable to Plaintiff for all injuries and damages inflicted on him as a result of said ultra-hazardous and/or abnormally dangerous activity.
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> 11. Defendant, [Woody's Tree Service] . . . was engaged in an inherently dangerous activity that was dangerous to the public and had the duty to provide preventive or safety precautions commensurate with the risks involved which included giving a precautionary warning to bystanders, including Plaintiff, . . . and to take the precautionary measure of seeing that all bystanders, including Plaintiff, were out of the zone of danger before proceeding to undertake or continue with said operation. . . .

On appeal, Willis raises only one issue for review by this Court: whether there is a genuine issue of material fact which renders summary judgment inappropriate in this case. Willis' arguments to this Court raise both factual and legal issues. Essentially, Willis argues that the trial court erred in (1) failing to consider Willis' factual allegations of causation not arising out of the use of the automobile, and (2) concluding that the concurrent causation doctrine was inapplicable because Willis' alleged injuries arose solely from the use of an automobile, an event excluded from coverage under the Policy. Willis' appellate brief concedes: "if the *only* allegation of negligence against David Ashley and Woody Ashley d/b/a Woody's Tree Service was the operation of the automobile, Penn-Star would be entitled to summary judgment." Willis argues, however, that the allegations of negligence in the proposed amended complaint are sufficient to permit a jury to determine that an act of negligence unrelated to use of the automobile – such as the failure to warn or the failure to remove bystanders from the zone of danger – was the cause of Willis' injuries.

Summary judgment is appropriate where the factual and legal conclusions drawn from the evidence reasonably permit only one outcome. ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995). To prevail on a motion for summary judgment, the moving party must demonstrate that there are no genuine issues of material fact and that she is entitled to a judgment as a matter of law. ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993). To determine whether a genuine issue of material fact exists, the trial court must take the strongest view of the evidence favoring the non-moving party, draw all reasonable inferences in favor of that party, and discard all countervailing evidence. ***Id***. at 210-11. In negligence actions, causation usually presents a factual question. ***Jones v. Ray***, 2005 WL 3416296, at *1 (Tenn. Ct. App. Dec. 13, 2005); ***Hale v. Lincoln County***, 2005 WL 3343824, at *6 (Tenn. Ct. App. Dec. 9, 2005). Nevertheless, issues related to causation may be decided at the summary judgment juncture so long as the evidence is uncontroverted and the facts, and reasonable inferences to be drawn therefrom, would permit a reasonable person to draw only one conclusion. ***Jones***, 2005 WL 3343824, at *1 (citing ***Rains v. Bend of the River***, 124 S.W.3d 580, 588 (Tenn. Ct. App. 2003)).

On appeal, the review of a grant of summary judgment as well as the interpretation of an insurance policy are questions of law. ***Doe v. HCA Health Svcs. of TN***, 46 S.W.3d 191, 196 (Tenn. 2001); ***Standard Fire Ins. Co. v. Chester-ODonley & Assoc., Inc.***, 972 S.W.2d 1, 5-6 (Tenn. Ct. App. 1998). As such, we review the trial court's decisions on these issues *de novo* with no presumption of correctness. ***Doe***, 46 S.W.3d at 196.

In the instant case, Willis argues that, although one cause of his injuries may have been excluded from coverage under the Policy, the negligence attributable to Woody's Tree Service was an additional cause which would be covered by the Policy. To resolve disputes of this nature, Tennessee courts apply the concurrent causation doctrine. This doctrine was addressed by the Tennessee Supreme Court in ***Allstate Insurance Company v. Watts***, 811 S.W.2d 883, 887 (Tenn. 1991). The ***Allstate*** Court explained: "[T]here should be coverage in a situation . . . where a nonexcluded cause is a substantial factor in producing the damage or injury, even though an excluded cause may have contributed in some form to the ultimate result and, standing alone, would have properly invoked the exclusion contained in [a] policy." 811 S.W.2d at 887. This test allows

for the reality that, in many personal injury actions predicated on negligence, there may be more than one legal cause of the injuries suffered. For the injury to be covered in a situation in which multiple events may have caused an injury and one of the events is excluded from insurance coverage, the covered event must be a *substantial* factor in causing the damage. ***Id***.

A decision by the Tennessee Court of Appeals in ***St. Paul Reinsurance Company, Limited v. Williams*** is also instructive on this issue. In ***St. Paul***, family members of a person shot and killed outside of a nightclub filed a lawsuit against the proprietors of the nightclub seeking damages for the death of their son. ***St. Paul Reinsurance Co., Ltd. v. Williams***, 2004 WL 1908808, at *1 (Tenn. Ct. App. Aug. 25, 2004). The insurance carrier for the club filed a declaratory judgment action, seeking a declaration that the commercial general liability policy issued to the club excluded from coverage claims for bodily injury and property damages arising from assault and battery and negligent hiring. ***Id***. The trial court granted summary judgment in favor of the insurance company, finding that the insurance policy did not provide coverage for the family members' claim against the club. ***Id***. at *2. This decision was affirmed on appeal. ***Id***. at *4. The appellate court found no evidence of a concurrent, coincident, or simultaneous cause covered by the insurance policy, which was a substantial factor in causing the injury. Therefore, it concluded that the concurrent causation doctrine should not apply to the family's claim. ***Id***.

In the instant case, viewing the evidence in the light most favorable to Willis and drawing all reasonable inferences in his favor, a reasonable person could only conclude that the use of the automobile was the predominant cause of Willis' injury, and that Willis' alleged damages arose from the use of the automobile. No event which was arguably covered by the Policy was a *substantial* factor in causing Willis' injury; nor did the excluded cause merely contribute to the injury. ***See Allstate Insurance Company***, 811 S.W.2d at 887. Consequently, we find no error in the trial court's ruling that the event causing Willis' injury was excluded from coverage under the Policy, or in the grant of summary judgment in favor of Penn-Star.

The decision of the trial court is affirmed. Costs on appeal are assessed against Defendant/Appellant Richard A. Willis, and his surety, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE